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No. 08-270

Supreme Court, U.S.
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In The

Supreme Court of the United States

T H INVESTMENTS, INC.,

Petitioner,

v.

KIRBY INLAND MARINE LP and
PORT OF HOUSTON AUTHORITY
OF HARRIS COUNTY, TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

PETITIONER'S REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

This petition for certiorari seeks review of a Texas court judgment abolishing the property rights of TH Investments Inc. ("THI") in approximately twenty-seven acres of land on the eastern tip of Carter-Kirby Island, called Tract I for the purposes of this litigation. THI's rights were extinguished and Tract I was lost to the State without the payment of just compensation as required by the Fifth and Fourteenth Amendments.

Neither the Port of Houston Authority ("Port") nor Kirby Inland Marine ("Kirby") disputes that judicially assisted takings jurisprudence is unsettled and in need of clarification. Both assert, however, that this is the wrong case and they cite three principal arguments to support that conclusion.

First, both the Port and Kirby rely on a "no-rights" fiction. They argue that THI has no property rights in Tract I and thus the Fifth Amendment's protections are not invoked. Second, they rely correspondingly on a "no-property" fiction arguing that because the Texas courts have declared Tract I forfeited to the State, THI possesses no property for which compensation is necessary. Both of these arguments beg the question. The rights flow from the property and takings cases almost always involve an assessment of whether the interest at issue qualifies as property. This case is no different and the fictions do not enlighten the analysis. Third, Kirby and the

Port contend that the outcome of the Texas litigation was completely foreseeable under Texas law, that THI should have known as much, and that this really is a state law case. There was nothing "usual" or "foreseeable" about the lower courts' holdings. The most closely analogous Texas Supreme Court case involving similarly submerged land strongly supports THI's ownership of Tract I.

THI suggests that the Port and Kirby miss the point of the Takings and Due Process Clauses and that this case provides this Court with a proper opportunity to clarify the law in this important area.

ARGUMENT IN REPLY

1. The Fifth Amendment does not exclude from coverage property that is under water. The plain language accords submerged lands the same protection as dry land. Whether the courts of Texas or any state may confiscate a property owner's rights because the property is under water in no way abrogates the federal constitutional obligation of the sovereign to pay for what it took. The no-property and no-rights fictions merit no weight in this discussion. Justice Stewart simply states the obvious when he comments, "for a state cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. State of Washington*,

389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). Justices O'Connor and Scalia express the same view in *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Justices O'Connor and Scalia, dissenting from a denial of the petition for certiorari), as does the Ninth Circuit in *Robinson v. Ariyoshi*, 753 F.2d 1468, 1473 (9th Cir. 1985). Neither the Port nor Kirby has added anything new to this convenient but unpersuasive attempt to avoid the plain language of the Fifth Amendment.

If Texas law requires that the Port take the property, it may do so, but Texas property law only takes this analysis so far. This case has reached the point where the Fifth and Fourteenth Amendments frame the relevant inquiry and Texas law must stand aside. These constitutional provisions require the Port to pay for the property.[1]

2. The fundamental premise of the briefs in opposition is that THI should have known that it was buying property that belonged to the Port under Texas law and that would eventually be confiscated. Accordingly, due process fairness is not implicated and the unforeseeability element accorded importance in the due process calculus in several of this Court's decisions is not present here. It is not clear

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[1] The Port seems to claim that it was dragged into Kirby's lawsuit and was forced to take property it did not want. Nothing in Texas law forces the Port to acquire ownership of Tract I. It could have disclaimed an interest and sided with THI or it could have paid just compensation.

that foreseeability is a necessary factor in a takings analysis, and that question has not been decided directly by this Court, but it is not difficult to conclude that the Takings Clause protects both the clairvoyant and those with less foresight in equal measure. However that might be resolved, the Port and Kirby's ultimate claim of the almost absolute foreseeability of the confiscation of Tract I is not well founded.

For over 160 years, Tract I shows an unbroken chain of continuous private ownership. The Republic of Texas patented this land into private ownership in 1845, and the property has since changed hands many times before and after it became partially submerged. State and local authorities, including the Port, were fully aware of its status and over the years, recorded title, collected transfer fees, levied and collected property taxes, and regulated water traffic around the property. When another part of the Island was condemned by eminent domain, appropriate compensation was paid to the owners.

Tract I in its current state has been in commercial use for thirty years and has produced revenue for its private owners over the period. THI purchased it for $500,000 with an intent to continue the commercial use of Tract I for its own benefit and met with the Port to discuss this continued use before purchasing

the property.[2] The property is not eroded into the deeper adjoining river bed and is simply a sunken island not much more than a foot beneath the surface. On rare occasions, it is dry land. When THI bought the property, its metes and bounds were surveyed by a method typically used in this setting and the deed for the property as described in the survey was recorded and filed to establish THI's ownership. No current or future public use of Tract I has been articulated by the Port.

The unbroken chain of title and the behavior of the Port as well as the State of Texas do not in any way suggest that THI had a basis on which to be concerned that its purchase or ownership of Tract I was in jeopardy.[3]

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[2] There is a factual dispute in the briefs over when THI met with the Port and obtained advice on how to maximize its use of Tract I. The Port says it occurred after the sale, but the record clearly proves that this meeting took place before the sale. 8 RR 303-313. At the meeting, the Port recommended an engineer for development of the site. *Id.* This is of no great constitutional moment, but it is a fact that merits correction.

[3] The Port and Kirby emphasize that THI was put on notice that it was acquiring coastal property subject to possibly changing boundaries. *See e.g.*, App. 4. This notice is language in a form earnest money contract required by Texas law that advises the purchaser to obtain a survey of the property, to obtain permission if there is an intent to place a structure or encumbrance over water, and that portions of the tract may be gained or lost due to boundary changes. There is no explanation why this routine notice should have been an eye-opener for THI since the notice had nothing to do with subsidence, the land being acquired was riparian not coastal property, similarly situated

(Continued on following page)

Neither do the cases relied upon by Respondents support their conclusions. The principal subsidence case in Texas jurisprudence is *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949 (Tex. 1976). The property in *York* is in the Houston river system not far from Carter-Kirby Island and downstream toward the Gulf of Mexico. The property is at least as much tidally influenced as Tract I. It became shallowly submerged land like Tract I mostly on account of subsidence. The Texas Supreme Court held that the property was not lost to the State, distinguishing submergence due to subsidence from the imperceptible and gradual loss due to erosion or from a "transportation of land beyond the owner's boundary." *York*, 542 S.W.2d at 954. While the Court noted that no one claimed erosion in *York*, there is nothing in the holding to suggest that any erosion at all defeats the rationale for allowing the continued ownership of subsided property. In fact, no Texas Supreme Court decision establishes a hierarchy of criteria such that erosion always trumps subsidence. A reasonable person in THI's position would assume that *York* applied to Tract I and would protect it from governmental

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property had been conveyed by the Port in submerged condition, this property had been conveyed previously in submerged condition, the property had been properly surveyed to the satisfaction of Texas authorities, and it had been used for commercial fleeting. Had THI consulted counsel, the Texas Supreme Court's decision in *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949 (Tex. 1976) would seem sufficient to resolve any concerns.

confiscation based on both historical behavior and legal principle. The rule announced in this case by the Texas appellate court holding that as a legal matter any erosion supersedes even massive subsidence and will inevitably result in forfeiture is brand new. The dispositive proposition relied upon by the lower courts in this case is stated in no prior Texas Supreme Court holding and there is no compelling reason to have anticipated this new rule.

Neither do the leading Texas cases, cited by the courts below and the parties, detract from this observation. The most often cited cases involve littoral, beach or bay front property that was newly formed and not previously a part of the parcels belonging to adjacent land owners. When the adjacent land owners tried to claim the new lands for themselves, the state interceded and prevailed in claiming state ownership. Nothing was taken because the property they bought and owned did not include the properties they wanted to annex. *See Luttes v. State*, 324 S.W.2d 167 (1958) (involving newly emergent sea coast land); *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410 (1943) (involving new land created by the long term deposit of oyster shells on the sea bed); and *Rudder v. Ponder*, 293 S.W.2d 736 (1956) (involving untitled land). *See* Pet. App. 41-42 (referring to these cases as a "trilogy" of leading cases).

In none of these cases did the state take titled property belonging to the private owner and in none of them does the Texas Supreme Court authorize the taking of private land, wet or dry, without just

compensation. To suggest that the outcome for THI was foreseeable or that THI is the victim of its own inattention is not supported at all. An outcome that has never happened is not usually foreseeable.

3. This case clearly implicates Fifth and Fourteenth Amendment questions. THI bought Tract I and set out in good faith to put it to commercial use, as many before had done. The Port with the assistance of the Texas courts confiscated the property depriving THI of the use and benefit of it without paying just compensation. That outcome is prohibited by the Takings and Due Process Clauses.

Whether the no rights/no property fictions that control the outcome in this case are appropriate judicially created exceptions to the plain language of the Takings and Due Process Clauses are important and unresolved questions that merit this Court's attention.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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